

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOAN MADRIGAL</b>	)	
Claimant	)	
VS.	)	
	)	
<b>PEDDLERS INN</b>	)	Docket No. 213,277
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant, Travelers Insurance Company, and respondent all appeal from an Award entered by Administrative Law Judge Pamela J. Fuller on April 14, 2000. The parties have waived oral argument and asked to submit the matter on the record and briefs.

**APPEARANCES**

C. Albert Herdoiza of Kansas City, Kansas, appeared on behalf of claimant. Gary R. Hathaway of Ulysses, Kansas, appeared on behalf of respondent. B. G. Larson of Dodge City, Kansas, appeared on behalf of Travelers Insurance Company. Wendel W. Wurst of Garden City, Kansas, appeared on behalf of the Fund.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found claimant suffered a series of injuries to her right hand with a date of accident of March 21, 1996, claimant's last day of work for respondent. The ALJ concluded claimant sustained a 27 percent disability to the right upper extremity and concluded the Kansas Workers Compensation Fund had no liability for any of the benefits.

Claimant asks for review of the following issues:

Is the Workers Compensation Fund liable for the benefits awarded in this case? Claimant asked that the benefits be awarded against the Fund pursuant to K.S.A. 44-532a on the grounds that on March 21, 1996, respondent was uninsured and unable to pay benefits.

Does claimant's disability extend into the neck and entitle claimant to benefits for disability to the body as a whole? Claimant asks that we adopt the opinions of Dr. Edward J. Prostic that claimant has an unscheduled disability.

Travelers Insurance asks for review of the following issue:

Is the Kansas Workers Compensation Fund liable for temporary total disability benefits and medical expenses paid by Travelers under a preliminary hearing order? Travelers did not insure claimant on March 21, 1996, the date found to be the date of accident in this case. Travelers paid certain preliminary hearing benefits pursuant to court order and asks that those benefits be reimbursed by the Fund pursuant to K.S.A. 44-534a.

Respondent asks for review of the following issues:

Should the date of accident be April 15, 1994?

Did claimant provide timely written claim?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be affirmed and further orders that respondent should reimburse Travelers Insurance for benefits paid by Travelers.

#### **Findings of Fact**

1. Claimant injured her right hand on April 15, 1994, when she accidentally hit a metal shelf. Claimant reported the accident and sought medical treatment but continued to work.
2. Claimant saw Dr. Neonilo A. Tejano, then Dr. Aurora Arribas, and eventually Dr. Guillermo Garcia. As claimant continued to work, the pain became worse and worse. Eventually claimant had difficulty gripping and opening her hand. She sought medical treatment. Dr. Garcia originally diagnosed carpal tunnel syndrome. He ordered an EMG and x-rays. The EMG was normal and the x-rays revealed degenerative osteoarthritis in the hand. Claimant left work March 21, 1996, for surgery March 22 by Dr. Garcia. Dr. Garcia's records show he performed a metacarpal phalangeal joint arthroplasty on the third digit of the right hand for degenerative osteoarthritis.

3. Dr. Garcia continued to treat claimant through September 4, 1996. Claimant continued to have pain, and Dr. Garcia then recommended claimant see Dr. Tyrone D. Artz. Dr. Artz performed a second surgery on claimant's hand.

4. Claimant first made formal written claim on May 2, 1996.

5. Claimant was examined by Dr. Prostic on November 4, 1998. He opined that claimant had injured both her right upper extremity and her cervical spine as a result of her employment with respondent. Dr. Prostic diagnosed osteoarthritis of the hand, symptoms consistent with carpal tunnel syndrome, and evidence of thoracic outlet syndrome. He rated claimant's impairment as 28 percent of the whole person.

6. Claimant was examined by Dr. C. Reiff Brown at the request of the ALJ. Dr. Brown diagnosed aggravation of preexisting osteoarthritis in the hand. He did not diagnose thoracic outlet syndrome. He concluded that one could not say to a reasonable degree of medical certainty that claimant had any impairment to the neck as a result of her work-related injury. He rated the impairment as to the upper extremity as 15 percent for range of motion, 9 percent for an implant during surgery, and 5 percent for strength deficit, for a total of 27 percent impairment to the upper extremity.

7. Traveler's Insurance insured respondent during the following periods:

May 10, 1993 to May 10, 1994

May 10, 1996 to May 10, 1997

May 10, 1997 to May 10, 1998

The record indicates respondent also had insurance coverage with Aetna Insurance from January 7, 1995 to January 7, 1996. Respondent had no coverage on March 21, 1996, the date determined to be the date of accident in this case.

Travelers paid medical expense and temporary total disability benefits. The temporary total disability benefits were for the period June 19, 1998 to August 14, 1998. Travelers paid medical expenses incurred in 1998.

8. Respondent was, at the time this case was submitted, an ongoing profit-making business. The evidence shows gross income and profit for 1993 through 1996 as follows:

1993 gross income of \$504,703 and net profit of \$41,553

1994 gross income of \$545,500 and net profit of \$41,640

1995 gross income of \$584,000 and net profit of \$17,179

1996 gross income of \$633,000 and net profit of \$13,744

### Conclusions of Law

1. The correct date of accident for claimant's injury was March 21, 1996, the last day claimant worked. *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

2. Claimant made formal written claim on May 2, 1996, less than 200 days after the date of accident and the written claim was, therefore, timely made. K.S.A. 44-520a.

3. The Board agrees with and affirms the conclusion that claimant has a 27 percent impairment to the right upper extremity. This conclusion is based on the testimony and report of Dr. Brown. Although claimant has had neck complaints, the Board finds claimant has not met her burden of proving a permanent impairment to the neck. The opinions of Dr. Prostic to the contrary appear to be speculation about possible cervical and other upper extremity conditions. He describes the diagnosis as symptoms consistent with or evidence of the conditions.

4. The Board concludes from the evidence in this case that respondent is able to pay the benefits and the Fund has no liability under K.S.A. 44-532a. The total benefits awarded, including medical benefits and temporary total disability previously paid by Travelers Insurance, amount to approximately \$15,000. The Board concludes that while payment of these obligations may be a substantial burden, respondent cannot be said to be insolvent or unable to pay the benefits.

5. The Board also concludes the Fund has no obligation to reimburse Travelers for temporary total disability or medical expenses Travelers has paid. The provisions of K.S.A. 44-534a(b) call for reimbursement by the Fund only in cases where it is determined that claimant is not entitled to the benefits paid. Claimant was entitled to the benefits paid in this case.

For benefits before the date of accident, any insurance carrier providing coverage at the time the expenses were incurred would be obligated to pay those benefits and would not be entitled to reimbursement. *Lott-Edwards v. Americold Corporation*, 27 Kan. App. 2d \_\_\_\_, 6 P.3d 947 (2000). This would include any temporary total disability or medical expenses incurred before the date of accident. Respondent, an uninsured employer on the date of accident, is separately obligated to pay permanent partial disability benefits, temporary total disability after the date of accident, and medical expenses incurred after the date of accident.

It appears that the only benefits paid by Travelers were for temporary total disability and medical expenses after the date of accident. Respondent is, therefore, obligated to reimburse Travelers for benefits Travelers paid but did not owe as indicated above.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on April 14, 2000, should be, and the same is hereby, modified in that the award of benefits is affirmed but, in addition, the Board orders respondent to reimburse Travelers for benefits Travelers paid for temporary total disability and medical expenses after March 21, 1996, the date of claimant's accident.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER**DISSENT**

The undersigned agrees that the Fund should not be obligated to reimburse Travelers under K.S.A. 44-534a and the undersigned agrees that the benefits paid by Travelers were paid on a claim for which Travelers did not have coverage. Given these circumstances, it seems quite likely that respondent should reimburse Travelers. But whether respondent is obligated to reimburse Travelers is a matter of contract between those two, Travelers and respondent. The undersigned would hold that the Board does not have jurisdiction over that contractual agreement and would, on that basis, find the Board has no authority to order respondent to reimburse Travelers.

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BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS  
Gary R. Hathaway, Ulysses, KS  
B. G. Larson, Dodge City, KS  
Wendel W. Wurst, Garden City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director